Supreme Court, U.S.
FILED

No. — 99 754 OCT 28 1999

OFFICE OF THE CLERK

IN THE
Supreme Court of the United States

ALLISON L. FORMAN,
Petitioner,

v.

REGAL INSURANCE COMPANY,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Virginia

PETITION FOR WRIT OF CERTIORARI

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October 28, 1999

WILSON-EPES PRINTING CO., INC. - (202) 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether certification of mail by the United States Postal Service satisfies the requirements of Virginia Supreme Court Rule 5:17(a)(1) and thus, the dismissal of Petition for Appeal by the Supreme Court of Virginia, under said Rule, denied Petitioner due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States?

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IN THE

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No. ——

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On Petition for Writ of Certiorari to the Supreme Court of Virginia

---

PETITION FOR WRIT OF CERTIORARI

Allison L. Forman respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Virginia.

OPINIONS BELOW

The decision of the Supreme Court of Virginia denying rehearing (App. 1a) is unreported. The decision of the Supreme Court of Virginia dismissing Petition for Appeal is unreported (App. 2a). The Order of the Circuit Court of the City of Alexandria is unreported (App. p. 3a).

JURISDICTION

On July 30, 1999, the Supreme Court of Virginia denied Petition for Rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., Amendment XIV, 1 which states in part:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 1257

STATEMENT OF THE CASE

This due process of law case arises from a denial of Petition for Rehearing arising from denial of Petition for Appeal to the Supreme Court of Virginia, the Court having dismissed said appeal "Finding that the appeal was not perfected in the manner provided by law . . . Rule 5:17(a)(1)" *Id.* 2a. (Ord. June 21, 1999), *id.* 1a, which states in part "a petition for appeal must be filed with the clerk of this Court: (1) in the case of an appeal direct from a trial court, not more than three months after entry of the order appealed from . . . Rule 5:17 (a)(1)" *Id.* 2a.

REASONS FOR GRANTING THE WRIT

Appellant respects the Rules of the Supreme Court of the United States and appreciates that "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." See Rule 10, "Rules of the Supreme Court of The United States."

In the matter before the Court, we are requesting review of the denial of Petition for Rehearing on Petition for Appeal as the Rules of the Supreme Court of Virginia are not properly stated. Thus, the ruling of the Court denying Petition for Rehearing and the dismissal of the Petition for Appeal violated Appellant's most fundamental right, the guarantee of due process of law.

BACKGROUND

On August 18, 1993, Appellant was a seventeen year old student residing in her parents' domicile. Appellant at all times had every reason to believe that she was operating a motor vehicle that was insured in the Commonwealth of Virginia in compliance with all Commonwealth statutes. Appellant became involved in a minor motor vehicle accident for which neither party was issued a citation by the City of Alexandria Police Department, no medical assistance was sought by either party, and no damage of any kind inclusive of scratch marks, dents and/or rubbings of any kind were sustained by the Appellee's insured. Appellant later learned that the insurance on the motor vehicles in her household, with the exception of one vehicle, had been terminated by the insurance company due to non-payment of premium and that the payments that she was personally hand-carrying to the offices of GEICO Insurance Company were solely and exclusively for payment of premiums for her father's vehicle. Her parents were separated during this time and subsequently divorced. Jury trial was held March 1, 1999. The jury verdict found Appellant negligent of causation of the accident and awarded $0.00 damages as they did not find that the injuries/medical expenses were caused by the accident. (In deposition, witness, Lizzie Moore, the injured party, testified ". . . just like I was telling the lawyers, sometimes I don't remember what I

did yesterday." *Deposition of Lizzie Moore.* March 9, 1999.) When the jury learned that judgment had been entered in the sum of $25,000.00, they immediately expressed their findings to the Court in writing and explained how they had set forth their verdict in light of the instructions to the jury, the responses to their questions and their frustrations based on communications with the Court. Appellant filed a request for reconsideration which was denied. Appellant filed Notice of Appeal on March 26, 1999 and Petition for Appeal on June 1, 1999. On June 30, 1999, Appellant filed Petition for Rehearing and on August 16, 1999, Appellant filed a motion to defer issuance of a mandate in this case. On September 13, 1999, the Supreme Court of Virginia ordered the issuance of said mandate and deferred to and including October 28, 1999 issuance of mandate unless docketed in the Supreme Court of the United States in which case mandate will be deferred until final determination of the case by that Court. (App. p. 4a.)

Rule 5:17(a)(1) states

> Petition for Appeal.
>
> (a) *Time for Filing.*—In every case in which the appellate jurisdiction of this Court is invoked, a petition for appeal must be filed with the clerk of this Court:
>
> (1) in the case of an appeal from a trial court, not more than three months after entry of the order appealed from;

(App. p. 6a.)

Rule 5:5(b) of the Rules of the Supreme Court of Virginia addresses filing by mail and said rule states in part:

> Any document required to be filed with the clerk of this Court, or filed in the office of the clerk of

> this Court, shall be deemed to be timely filed if it is mailed postage prepaid to the clerk of this Court by registered or certified mail and if the official receipt therefor be exhibited upon demand of the clerk or any party and it shows mailing within the prescribed time limits.

(App. p. 6a.)

The Appellant in this matter was in full compliance with Rule 5:17(a)(1) and Rule 5:5(b). Appellant filed Petition for Appeal to the Supreme Court of Virginia at Richmond, three (3) months from the date of entry of the Circuit Court judgment, on June 1, 1999, having certified the mailing of said petition with the United States Postal Service Certificate of Mailing (App. p. 7a). On June 21, 1999, the Supreme Court of Virginia dismissed said Petition for the reason stated above. Appellant filed a Petition for Rehearing on June 30, 1999, which was denied on July 30, 1999. *Id.* 1a.

Appellant's Petition for Rehearing, *id.* 1a, provided to the Supreme Court of Virginia the United States Postal Service Certificate of Mailing PS Form 3817 (App. p. 8a), which description states is "The stamped postmark placed on your receipt when the item is mailed provides proof of mailing." PS Form 3817. *Id.* 8a. This certification is also described as "the most inexpensive way to provide proof of when an item was mailed and to whom." PS Form 3817. *Id.* 8a. The requirements of this form include identifying the addressee as well as the name and address of the recipient. The Postal Service then affixes its date stamp to the certificate certifying that this item was mailed to the recipient at the address shown on the certificate on the date affixed.

In addition to the certifying of mail by the method identified above, there are other methods of certifying

mail by the United States Postal Service that will provide the same documentation required by Rule 5:5(b) and 5:17(a)(1). *Id.* 6a. United States Postal Service Certified Mail (PS Form 3800) (App. p. 9a) is a form entitled "Certified Mail." This form describes PS Form 3800, *id.* 9a, as "The stamped postmark placed on your receipt when the item mailed provides proof of mailing." PS Form 3800. *Id.* 9a. This method of mailing provides additional services; however, these services are not requirements of Rules 5:17(a)(1) and 5:5(b), respectively. *Id.* 6a. What is required to deem this filing timely is that Appellant have the capacity to exhibit an official receipt "upon demand of the clerk or any party and it shows mailing within the prescribed time limits." Rules of Supreme Court of Virginia Rule 5:5(b). *Id.* 6a. The Supreme Court of Virginia explicitly sought to clarify the reasoning for requiring the registration and certification when filing documents by mail.

> Purpose of mailing provision.—The mailing provision was not created to extend the time in which a party has to file a petition, but (1) to circumvent the inconvenience of having to personally appear in the clerk's office to effect a filing, and (2) to protect a party from those delays which often occur in the regular dispatch of mail and naturally are outside a party's control. *Reese v. Wampler Foods, Inc.*, 222 Va. 249, 278 S.E. 2d 870 (1981).

There is no question that this Appellant's Petition for Appeal was received by the Clerk of the Court. This is clear by the Court's action to dismiss the Petition on the grounds that it was not perfected according to law. However, at all times, Appellant clearly followed the letter of the law and the spirit of the law.

> 1. The law states that this Petition must be filed within three months of the order entering judgment.

Judgment was entered March 1, 1999. The Petition for Appeal was filed June 1, 1999, three months from the date of judgment.

2. The law states that filing by mail must be by registered or certified mail. The Petition for Appeal was mailed certified by United States Postal Service Certificate of Mailing PS Form 3817, *id.* 8a, a United States Postal Service form which certifies that mail was mailed to a specific recipient at a specific address by a specific person/s on a specific date. In this case, June 1, 1999 was the postmark on this Certificate of Mailing. *Id.* 7a.

3. The official receipt for this mailing was exhibited to the clerk in the Petition for Rehearing as a demand for said exhibit of official receipt was never made of Appellant.

The term "certified mail" as used in Rule 5:5(b), *id.* 6a, is a common noun [1] and does not specifically identify only one method of certified mail. Rather it provides the Appellant with the ability to mail the Petition for Appeal by any method that certifies the date on which the Petition was posted.

By definition, the term "certificate" means: "A document testifying to the truth of something. Lat. *certifi-*

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[1] Common Noun: A common noun names any one class of objects. EXAMPLES: child, tree, home, registered mail, certified mail, common noun. Language Practice 7. Unit 3, Grammar and Usage. Steck-Vaughn Publishing Company, 1997. P. 46. A common noun is a general non-specific term that identifies a category of person, place or thing and is not capitalized. Rule 5:17(a)(1) which references timely filing of the Petition for Appeal and thus references Rule 5:5(b), "registered or certified mail" was not capitalized, and therefore, a specific form of registered or certified mail was not required. What was specifically required was that the mailing by registered or certified mail for which an official receipt showing that the filing timely could be exhibited before the clerk of the Court or other parties upon demand.

catum, something certified . . . neut. of Llat. certificatus, p.part. of certificare, to certify. See CERTIFY" American Heritage College Dictionary 3rd Edition, Houghton Mifflin Company 1997, p. 230. The Webster's Third New International Dictionary Unabridged defines certificate as "1. The act of certifying or certificating or the state of being certified or certificated 2. a certified statement: CERTIFICATE." Webster's also defined certified as "endorsed authoritatively; guaranteed or attested as to quality, qualifications, fitness, or validity." Webster's Third New International Dictionary Unabridged. Merriam-Webster Inc., Springfield, Massachusetts, 1993, p. 367.

If the Rules of the Supreme Court of Virginia had the intent of providing only one form of certifying mailing, then the rule would require the specific stating of the form of certification—the use of a proper noun,[2] the specific name of a form of mailing. In this instance the term "United States Certified Mail" or "United States Postal Service Certified Mail, PS Form 3800", *id.* 9a, would be required to limit all certifying of mailings to this specific form. However, the Rules of the Supreme Court of Virginia clearly elect to be more broad in this matter. They require registered or certified mail but are non-specific as to the carrier and/or the specific form of registration or certification.

The Supreme Court of Virginia in *Reese v. Wampler* clearly and specifically states that timely receipt is not the

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[2] Proper Noun "A proper noun names a particular person, place, or thing. It begins with a capital letter. EXAMPLES: Andrew Jackson, Chicago, Statute of Liberty." *Ibid.*, P. 46. In the matter before the Supreme Court of Virginia, a specific or particular form of "registered or certified mail" was not required or the ruule would have stated "Registered or Certified Mail" or "United States Postal Service Registered or Certified Mail."

intent of Rule 5:5(b) but rather, timely mailing. *Id.* 6a. (However, it is interesting to note that to certify by Certificate of Mailing generally speaking provides a more rapid delivery to recipient as opposed to certifying by Certified Mail as the requirement of United States Certified Mail requires signatures throughout the delivery process.)

Appellant has fulfilled all requirements to satisfy the Rules of the Supreme Court of Virginia, Rule 5:17(a)(1) and 5:5(b). *Id.* 6a. Petition was filed in a timely manner; Petition was mailed by certified mail; Appellant provided official receipt to the Court that the documents were mailed within the prescribed time limits.

When a citizen of a state or commonwealth is denied due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States, a Writ of Certiorari should be granted to enforce her constitutional rights as a citizen of the United States and of the state or commonwealth.

In the matter before the Court, the Appellant executed all requirements as a matter of law as set forth in the Rules of the Supreme Court of Virginia to perfect the Petition for Appeal. There is no question that by fundamental rules of grammar and definition of terms applicable in this case, the letter of the law and the spirit of the law were in compliance with the requirements of the Rules of the Supreme Court of Virginia in every instance. Therefore, Petition for Appeal was filed in a timely manner and should not have been dismissed. In accordance with Rule 5:5(b), *id.* 6a, the Supreme Court of Virginia had the obligation to demand for exhibit to the clerk of the Court an official receipt showing that the mailing had been certified and that it had been mailed within the prescribed time limits. Rather, the Court dismissed the Petition for Appeal

and upon Petition for Rehearing denied the exhibit of the official receipt which clearly exhibited that the United States Postal Service had certified that the Petition for Appeal had been mailed on June 1, 1999, not more than three months after entry of order appealed from (Rule 5:17(a)(1). *Id.* 6a.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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(703) 352-8500
Counsel for Petitioner

October 28, 1999

APPENDIX

APPENDIX

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 30th day of July, 1999.

Record No. 991158
Circuit Court No. CL 960409

ALLISON L. FORMAN,
Appellant,

against

REGAL INSURANCE COMPANY,
Appellee.

UPON A PETITION FOR REHEARING

On consideration of the petition of the appellant to set aside the judgment rendered herein on the 21st day of June, 1999 and grant of rehearing thereof, the prayer of the said petition is denied.

A Copy,

Teste:

/s/ [Illegible]
Clerk

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Monday the 21st day of June, 1999.

Record No. 991158
Circuit Court No. CL 960409

ALLISON L. FORMAN,
Appellant,

against

REGAL INSURANCE COMPANY,
Appellee.

From the Circuit Court of the City of Alexandria

Finding that the appeal was not perfected in the manner provided by law, the Court dismisses the petition for appeal filed in the above-styled case. Rule 5:17(a)(1).

A Copy,

Teste:

DAVID M. BEACH
Clerk

By: /s/ Jennifer G. Earle
Deputy Clerk

VIRGINIA:

IN THE CIRCUIT COURT
FOR THE CITY OF ALEXANDRIA

At Law #CL 960409

REGAL INS. CO.,

Plaintiff

vs.

ALLISON FORMAN,

Defendant

ORDER

This cause came on this day upon the pleadings heretofore filed for trial by jury/by the Court.

AND IT APPEARING that the jury has found in favor of the plaintiff, it is therefore

ORDERED, ADJUDGED, and DECREED that plaintiff be and it hereby is granted judgment against Defendant in the amount of $25,000 together with interest from April 7, 1997, and its costs expend.

AND THIS CAUSE IS ENDED.

ENTERED this 1 day of March, 1999.

/s/ [Illegible]
Judge

SEEN:

/s/ [Illegible]
Counsel for Plaintiff
3/1/99

SEEN:

/s/ [Illegible]
Counsel for Defendant

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Monday the 13th day of September, 1999.

Record No. 991158
Circuit Court No. CL 960409

ALLISON L. FORMAN,
Appellant,

against

REGAL INSURANCE COMPANY,
Appellee.

FROM THE CIRCUIT COURT
OF THE CITY OF ALEXANDRIA

On August 16, 1999 came the appellant, by counsel, and filed a motion to defer issuance of the mandate in this case.

Thereupon came the appellee, by counsel, and filed a response.

On consideration whereof, it is ordered that issuance of the mandate be and the same hereby is deferred, to and including the 28th day of October, 1999, on the expiration of which time the same may be issued, unless the case has been before that time docketed in the Supreme Court of the United States, in which event issuance of the

mandate shall be deferred until the final determination of the case by that Court.

A Copy,

Teste:

/s/ [Illegible]
Clerk

RULES OF THE SUPREME CT. OF VA.

E. PERFECTING THE APPEAL

Rule 5:17. Petition for Appeal.

(a) *Time for Filing.* — In every case in which the appellate jurisdiction of this Court is invoked, a petition for appeal must be filed with the clerk of this Court:

(1) in the case of an appeal direct from a trial court, not more than three months after entry of the order appealed from; * * *

Rule 5:5. Extension of Time; Filing by Mail.

* * * *

(b) Any document required to be filed with the clerk of this Court, or filed in the office of the clerk of this Court, shall be deemed to be timely filed if it is mailed postage prepaid to the clerk of this Court by registered or certified mail and if the official receipt therefor be exhibited upon demand of the clerk or any party and it shows mailing within the prescribed time limits. This rule does not apply to documents to be filed in the office of the clerk of the trial court or clerk of the Virginia Workers' Compensation Commission or clerk of the State Corporation Commission.

U.S. POSTAL SERVICE **CERTIFICATE OF MAILING**

MAY BE USED FOR DOMESTIC AND INTERNATIONAL MAIL, DOES NOT PROVIDE FOR INSURANCE — POSTMASTER

Received From:

MICHAEL TOOBIN, P.C.
10511 Judicial Dr.
Fairfax, Virginia 22030

One piece of ordinary mail addressed to:

The Supreme Court of Virginia
of Richmond
Clerk of the Court
100 North 9th St.
Richmond, Virginia 23219

PS Form 3817, Mar. 1989

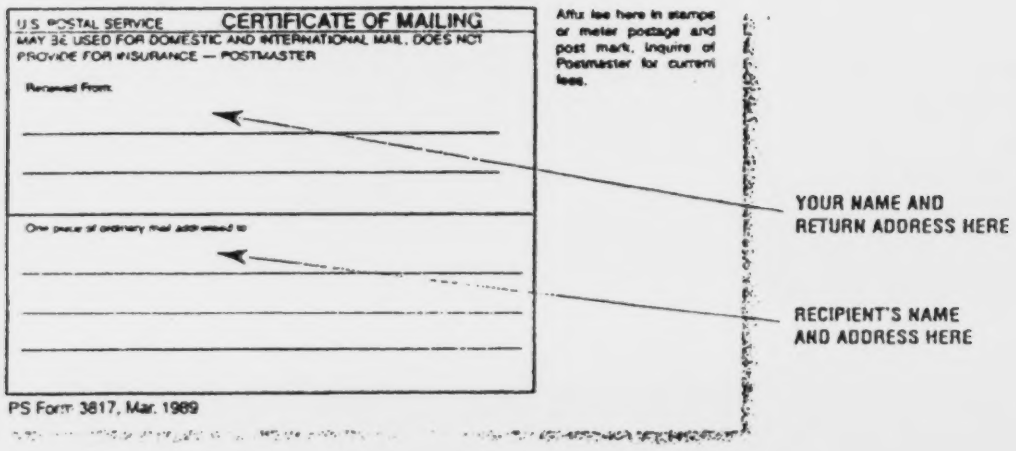
ST. PAUL MN TWIN CITIES BR
JUN 1
U.S. POSTAGE
SVCS
JUN 01 '99
AMOUNT
$0.60
00031140-20

UNITED STATES POSTAL SERVICE

0000

CERTIFICATE OF MAILING

The most economical way to prove when an item was mailed


U.S. POSTAL SERVICE
CERTIFICATE OF MAILING
MAY BE USED FOR DOMESTIC AND INTERNATIONAL MAIL. DOES NOT PROVIDE FOR INSURANCE — POSTMASTER
Received From:
One piece of ordinary mail addressed to:
Affix fee here in stamps or meter postage and post mark. Inquire of Postmaster for current fees.
YOUR NAME AND RETURN ADDRESS HERE
RECIPIENT'S NAME AND ADDRESS HERE

PS Form 3817, Mar. 1989

Price: 60¢ Plus Postage **PS Form 3817**

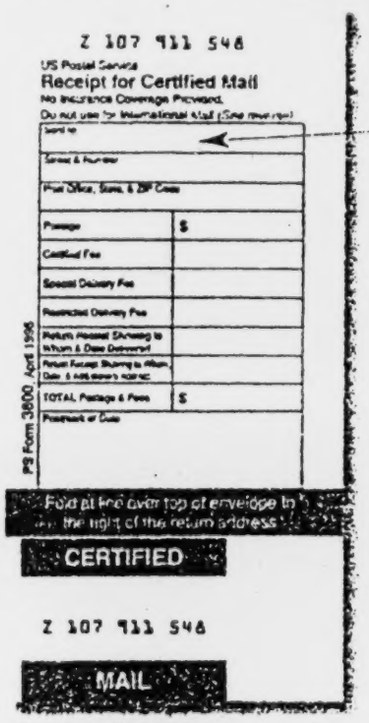
Proof You Mailed It	**YES**	The stamped postmark placed on your receipt when the item is mailed provides proof of mailing.
Proof They Received It	**NO**	Not available with this service.
Electronic And Verbal Delivery Status	**NO**	Delivery Confirmation is not available with this service.
Delivery Records	**NO**	The post office does not keep records of this service.*
Insurance	**NO**	Not available with this service.
Restricted Delivery Service	**NO**	Not available with this service.
Service Specifications • This service is available for ordinary mail of any class and international mail. • A Certificate of Mailing can only be purchased at the time the article is mailed.		

***Please keep your receipt in a safe place. The post office does not keep a record of this transaction.**

The Certificate of Mailing is a postmark that you keep. It is the most inexpensive way to provide proof of when an item was mailed and to whom.

If you are sending large quantities of mail, please ask your clerk about the "Firm Mailing Book for Accountable Mail" or our "Certificate of Bulk Mailing."

CERTIFIED MAIL


Z 107 911 548
US Postal Service
Receipt for Certified Mail
No Insurance Coverage Provided.
Do not use for International Mail (See reverse)
Sent to
Street & Number
Post Office, State, & ZIP Code
Postage
$
Certified Fee
Special Delivery Fee
Restricted Delivery Fee
Return Receipt Showing to Whom & Date Delivered
Return Receipt Showing to Whom, Date, & Address of Agent
TOTAL Postage & Fees
$
Postmark or Date
PS Form 3800, April 1995
Fold at line over top of envelope to the right of the return address
CERTIFIED
Z 107 911 548
MAIL

RECIPIENT'S NAME AND ADDRESS HERE

The smart way to send:

- INCOME TAX RETURNS
- TAX DOCUMENTS
- CONTRACTS
- INSURANCE PREMIUMS
- COLLEGE APPLICATIONS
- DIVORCE DOCUMENTS
- LICENSE RENEWALS
- MORTGAGE PAYMENTS
- CASHIER'S CHECKS
- LEGAL PACKAGES AND DOCUMENTS
- DATE-SENSITIVE APPLICATIONS

$ Use our Registered Mail service to send valuable items needing extra security

Price: $1.40 Plus Postage

PS Form 3800

Proof You Mailed It	**YES**	The stamped postmark placed on your receipt when the item is mailed provides proof of mailing.
Proof They Received It	◆	Return Receipts are available for an additional $1.25 when you mail the article.
Electronic And Verbal Delivery Status	**NO**	Delivery Confirmation is not available with this service.
Delivery Records	**YES**	Records are kept at the recipient's post office for two years. A copy of the delivery record requested after the article is mailed is $7.
Insurance	**NO**	Not available with this service.
Restricted Delivery Service	◆	Available for an additional $2.75.
Service Specifications • Articles may be sent using either Priority Mail or First-Class Mail. • Articles must have a return address. • Not available for international mail.		

Certified Mail requires the person receiving your mailpiece to sign a delivery receipt and provides you with proof of the mailing date and address.

If the recipient is not there when we try to deliver the article:

- A notice will be left explaining that the article will be held at the post office and requesting that the recipient either pick up the article or request a specific delivery date when they will be available to sign for the article.
- A second notice will be left in five days.
- [illegible]

No. 99-754

IN THE

Supreme Court of the United States

ALLISON L. FORMAN,

Petitioner,

v.

REGAL INSURANCE COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF VIRGINIA

RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT PURSUANT TO RULE 29.6

The parent company of the Respondent is American Financial Group. No publicly held company owns 10% or more of the stock of the Respondent.

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Regal Insurance Company [hereinafter, referred to as "Respondent" and "Regal"], by counsel, respectfully files this Brief in Opposition to the Petition for Writ of Certiorari [hereinafter, referred to as "Petition"] filed by Allison L. Forman [hereinafter referred to as "Petitioner" and "Forman"].

ORDERS ISSUED BELOW

On March 1, 1999, after the conclusion of a jury trial, the Circuit Court for the City of Alexandria, Virginia entered judgment on behalf of Regal in the amount of $25,000.00 together with interest from April 7, 1997, and its costs expended. *Regal Insurance Company v. Forman*, At Law #CL-960409 (C. Ct. Va. March 1, 1999). On June 21, 1999, Forman's Petition for Appeal to the Supreme Court of Virginia was dismissed for failure of Forman to perfect said appeal in a manner provided by law. *Forman v. Regal Insurance Company*, Record No. 991158 (Va. June 21, 1999). Forman's Petition for Rehearing to the Supreme Court of Virginia was denied on July 30, 1999. *Forman v. Regal Insurance Company*, Record No. 991158 (Va. July 30, 1999).

RESPONDENT'S OBJECTIONS TO FORMAN'S PETITION FOR WRIT OF CERTIORARI PURSUANT TO RULE 15 OF THE RULES OF THE UNITED STATES SUPREME COURT.

A. Plaintiff's Objection to Forman's Assertion of this Court's Jurisdiction Pursuant to 28 U.S.C. § 1257.

Forman summarily asserts that the United States Supreme Court has jurisdiction in this case based upon 28 U.S.C. § 1257. Forman's assertion is without merit.

28 U.S.C. § 1257(a) provides that "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court . . ." However, in this case, Forman's appeal was not considered by the Virginia Supreme Court because of her failure to properly perfect her appeal in a manner provided by law. Therefore, no "final judgment or decree" was rendered by the highest court of the Commonwealth of Virginia and the United States Supreme Court does not have jurisdiction to review this case under 28 U.S.C. § 1257.

First, Forman's Petition is defective on its face because it fails to allege jurisdiction in this Court. While Forman summarily invokes 28 U.S.C. § 1257, she neglects to address the essential elements of that statute. Nowhere in her Petition does Forman state that a final judgment was rendered by the Virginia Supreme Court. Instead, Forman's Petition focuses upon the verdict rendered by the jury in the Circuit Court for the City of Alexandria, Virginia. Because the Petition, on its face, does not set forth the basic requirements for jurisdiction to lie in this Court, Forman's appeal to this Court must be denied.

Further, even if Forman's failure to specifically set forth a basis for jurisdiction is not fatal, the record of this case dictates that jurisdiction cannot lie in this Court under the requirements of 28 U.S.C. § 1257. As stated above, no final judgment or decree was rendered by the highest court of Virginia. In fact, the Supreme Court of Virginia could not review Forman's appeal to that court because it was not properly filed as required by law. This denial of Forman's Petition for Appeal to the Supreme Court of Virginia did not rise to the level of a final judgment or decree as required by 28 U.S.C. § 1257.

Although 28 U.S.C. § 1257 was amended in 1988, the language requiring a "final judgment or decree" has been consistently interpreted by this Court. Accordingly, this Court's jurisdiction to review state court decisions is limited to final judgments rendered by the highest court of a state in which a decision may be had. *See Flynt v. Ohio*, 101 S. Ct. 1958, 451 U.S. 619, 68 L. Ed. 2d 489 (1981). Moreover, if a specific issue is not necessarily decided by the highest state court by its affirmation of a lower court ruling, then the United States Supreme Court has no power to consider that specific issue. *See Street v. New York*, 89 S. Ct. 1354, 394 U.S. 576, 22 L. Ed. 2d 572, *on remand*, 250 N.E.2d 250, 24 N.Y.2d 1026, 302 N.Y.S.2d 848 (1969).

In this case, it is clear that the Virginia Supreme Court never had the opportunity to review the merits of Forman's appeal or to render a final judgment thereon. Since Forman failed to perfect her appeal in the manner provided by law, the rules of the Supreme Court of Virginia dictated that the appeal could not be considered and that the appeal had to be denied by default.

This Court has held that a default judgment does not rise to the level of a "final judgment or decree." In *Hammerstein v. Superior Court of California*, 71 S. Ct. 820, 341 U.S. 491, 95 L. Ed. 1135, *rehearing denied*, 72 S. Ct. 21, 342 U.S. 843, 96 L. Ed. 637 (1951), the California Supreme Court refused to grant a writ of certiorari from a default judgment entered by the Superior Court of California because the petitioner had failed to utilize the proper channels of review by appealing from the judgment rendered by the lower court. This Court determined that it did not have jurisdiction to review the proceedings arising from the default judgment since a final judgment had not been rendered by the highest court of California. *Id.* at 71 S. Ct. 820.

In conclusion, a jury verdict was rendered in this case in the Circuit Court for the City of Alexandria, Virginia and the appeal thereto was denied because of Forman's failure to properly perfect the appeal. That failure resulted in a denial of Forman's appeal by default and, therefore, no "final judgment or decree" was rendered by the Virginia Supreme Court. Forman's Petition fails, on its face, to properly allege jurisdiction in this Court, and the facts demonstrate that the essential elements of 28 U.S.C. § 1257 have not been satisfied. Thus, this Court lacks jurisdiction to consider Forman's Petition.

B. Respondent's Objections to Petitioner's Misstatements of Law and Fact.

1. Regal objects to the misstatement of law and fact contained in Forman's Petition. "The jury verdict found Appellant negligent of causation of the accident and awarded $0.00 damages as they did not find that the injuries / medical expenses were caused by the accident." Petition p. 3. Since the issue of Regal's damage claim was decided by the Court as a matter of law in the trial of the matter, it was not the province of the jury to determine the nature and extent of the damages. Thus, any superfluous information included by the jurors with respect to damages was and is irrelevant to this proceeding.

2. Regal objects to the misstatement of law and fact contained in Forman's Petition stating

> When the jury learned that judgment had been entered in the sum of $25,000.00, they immediately expressed their findings to the Court in writing and explained how they had set forth

> their verdict in light of the instructions to the jury, the responses to their questions and their frustrations based on communications with the Court.

Id. at p. 4. This statement is inaccurate, irrelevant and, most importantly, not a part of the record of this case. Thus, Regal objects to the statement's inclusion in Petitioner's brief and requests that the Court does not consider same.

3. Regal objects to the misstatement of law and fact contained in Forman's Petition that "Appellant filed Notice of Appeal on March 26, 1999 and Petition for Appeal on June 1, 1999." *Id.* at p. 4. In reality, Forman failed to file her Petition for Appeal by June 1, 1999, as was provided for by Rules 5:17(a)(1).[1] and 5:5(b)[2] of the Rules of the Supreme Court of

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1. Rule 5:17 Petition for Appeal.

> (a) *Time for Filing.* — In every case in which the appellate jurisdiction of this Court is invoked, a petition for appeal must be filed with the clerk of this Court:
>
> (1) in the case of an appeal direct from a trial court, not more than three months after entry of the order appealed from; . . .

2. Rule 5:5. Extension of Time; Filing by Mail.

> (b) Any document required to be filed with clerk of this Court, or filed in the office of the clerk of this Court, shall be deemed to be timely filed if is mailed postage prepaid to the clerk of this Court by registered or certified mail and if the official receipt therefor be exhibited upon demand of the clerk or any party and it shows mailing within the prescribed time limits. This rule does not apply to documents to be filed in the office of the clerk of the trial court or clerk of the Virginia Worker's Compensation Commission or clerk of the State Corporation Commission.

Virginia The aforesaid rules provide for filing at the clerk's office of Virginia Supreme Court in Richmond, Virginia, or, alternatively, by mailing same by registered or certified mail the day in which the Petition for Appeal is due. Forman was unable or unwilling to utilize either method. Thus, Regal objects to the statement as quoted above.

4. Regal objects to the misstatement of law and fact contained in Forman's Petition that "The Appellant in this matter was in full compliance with Rule 5:17(a)(1) and Rule 5:5(b)." In fact, Forman failed to comply with both Rule 5:17(a)(1) and Rule 5:5(b).

ARGUMENT

A. The Due Process Clause of the United States Constitution.

Forman claims that the denial of her appeal by the Virginia Supreme Court violates the Due Process clause of the United States Constitution, as is applied to the states by the Fourteenth Amendment. However, she has failed to identify either a substantive right that has been denied or a procedural inadequacy that triggers the Due Process clause. Thus, Forman's Petition must be dismissed.

1. Substantive Due Process.

In her Petition, Forman implicitly contends that she has a substantive right to have her appeal heard on the merits. However, this Court has consistently held that litigants have no substantive right to an appeal.

The right of appeal is not essential to due process. *Reetz v. Michigan*, 188 U.S. 505, 23 S. Ct. 390, 47 L. Ed. 563 (1903). An appellate review is not essential to due process of law, but is a matter of grace. *Luckenbach S.S. Co. v. United States*, 272 U.S. 533, 47 S. Ct. 186, 71 L.E. 394 (1926). The right of appeal is not essential to due process, provided that due process has already been accorded in the tribunal of first instance. *Ohio ex rel. Bryant v. Akron Metropolitan Park Dist.*, 281 U.S. 74, 50 S. Ct. 228, 74 L. Ed. 710 (1930). Due process does not comprehend the right of appeal. *District of Columbia v. Clawans*, 300 U.S. 617, 57 S. Ct. 660, 81 L. Ed. 843 (1937). If a full and fair trial on the merits is provided, the due process clause of the Fourteenth Amendment does not require a state to provide appellate review. *Lindsey v. Normet*, 405 U.S. 31, 92 S. Ct. 862, 21 L. Ed. 2d 36 (1972). There is no constitutional right to an appeal. *Jones v. Barnes*, 463 U.S. 745, 103 S. Ct. 3308, 77 L. Ed. 2d 987 (1983).

In the case at hand, Forman was provided with a trial on the merits. At that trial, Forman was afforded the opportunity to cross examine the witnesses called against her and to call her own witnesses. She took advantage of both those opportunities and still lost her case. In fact, Forman does not contend in her Petition that she was denied due process by the trial court.

Therefore, since it is uncontested that due process was provided to Forman in the trial court and since there is no right to an appeal, Forman was provided all of the process that was due under the Constitution. Thus, the Virginia Supreme Court's dismissal of Forman's Petition for Appeal was appropriate and must be upheld.

2. Procedural due process.

Forman implicitly argues in her Petition that the Virginia Supreme Court's denial of her Petition for Appeal based on her failur to properly perfect her appeal as required by law amounts to a violation of her procedural due process rights. This contention is also without merit.

Under normal circumstances, the determination of whether there is a procedural due process violation is governed by a balancing of the following factors: (1) the private interest affected by the official action; (2) the risk of an erroneous deprivation of said interest; (3) the probable value of additional or substitute procedural safeguards; and (4) the government's interest, including the fiscal and administrative burdens that additional or substitute procedures would entail. *Mathews v. Eldridge*, 424 U.S. 319, 47 L. Ed. 2d 18, 96 S. Ct. 893 (1976).

In this case, however, there is no substantive due process violation because Petitioner has no right to appeal. If the Petitioner has no substantive right, then the absence of any protective procedures cannot be a violation of procedural due process. *See Caballero v. Caplinger*, 914 F. Supp. 1374, 1378 (E.D. La. 1996) ("if there is no right, the absence of any protective procedures is immaterial"). Petitioner can only be entitled to a meaningful procedure, the process that is due, if she first shows the deprivation of a protected constitutional interest. As demonstrated, Petitioner has no statutory or constitutional right to an appeal. *See Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 118 S. Ct. 1244, 1249 n.2, 140 L. Ed. 2d 387 (1998) (holding that asserting a mere protected interest in a process itself is not a cognizable claim); *Olim v. Wakinekona*, 461 U.S. 238, 249-50, 75

L. Ed. 2d 813, 103 S. Ct. 1741 (1981) (finding that an individual cannot claim a constitutional right in the "process" until he or she can demonstrate a cognizable liberty interest). Therefore, Forman cannot even claim a violation of her procedural due process rights.

Notwithstanding that conclusion, if the Court did balance the *Mathews* factors, Forman's claim of a procedural due process violation would still fail. Balancing the risk of an erroneous deprivation against the government's interest, the government's interest outweighs that of Petitioner. Forman's right to an appeal is not absolute, especially in light of the fact that her Petition for Appeal could have been mailed to the court on any earlier date to ensure timely receipt, or that the she could have hand-delivered the Petition for Appeal to the Virginia Supreme Court clerk's office on or before the June 1, 1999 deadline. Instead, Forman chose to disregard or ignore the letter of the law and to file her Petition in a manner contrary to the Rules of the Supreme Court of Virginia. She cannot now claim that her due process rights were violated by her own actions in selecting an improper method for delivering her Petition for Appeal to the Supreme Court of Virginia.

Based upon the above, it is clear that Forman has failed to raise any facts or law in support of her contention that her procedural due process rights have been violated. She has not asserted a Constitutionally protected right, nor has she indicated how her own mistake constitutes a violation of her due process rights. Accordingly, Forman's Petition must be dismissed.

B. Rule 10 of the Rules of the Supreme Court of the United States.

As this Court is aware, review on a writ of certiorari is not a matter of right, but of judicial discretion and only will be granted for compelling reasons. Under Rule 10(c) of the United States Supreme Court, if "a state court . . . has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.", this Court may hear the case. However, in the case at hand, Forman's Petition has not identified the "an important question of federal law that has not been, but should be, settled by this Court", nor has Forman's Petition identified any decision that has been rendered by the Virginia Supreme Court which "conflict(s) with the relevant decisions of this Court".

While the language of Rule 10 is neither controlling nor a full measure of this Court's discretion, the reasons for review enumerated therein do indicate the "character of the reasons" this Court considers when it hears cases. Since Forman fails to address those considerations in her Petition, Regal asks that Forman's Petition for Writ Certiorari be denied.

CONCLUSION

Allison L. Forman's Petition for Writ of Certiorari must be denied. It fails on its face to properly allege the jurisdiction of this Court and fails to demonstrate that a "final judgment or decree", necessary for this Court's jurisdiction, was rendered by the Virginia Supreme Court. Moreover, the Petition fails on its face to allege or to demonstrate that a substantive or procedural due process right was violated by the Courts of Virginia. Lastly, the Petition fails to even address those factors enumerated by Rule 10 of the Rules of the United States Supreme Court, which serve as a guide to this Court's consideration of Petitions for Writ of Certiorari.

For the foregoing reasons, Regal Insurance Company requests that Allison L. Forman's Petition for Writ of Certiorari be denied.

Respectfully submitted,

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